IN THE MATTER OF The Ontario Human Rights Code,
R.S.O. 1981, c.53, as amended.

B E T W E E N:

DIANE GALE

Complainant

- and -

MIRACLE FOOD MART, A DIVISION OF STEINBERG'S INCORPORATED

Respondent

AND

THE ONTARIO HUMAN RIGHTS COMMISSION

Complainant

- and -

UNITED FOOD WORKERS INTERNATIONAL UNION,
LOCALS 175 AND 633

Respondents

B E F O R E: Professor Constance Backhouse
Chair, Board of Inquiry

HEARING: Toronto, Ontario
30 March 1992

APPEARANCES: Geri Sanson & Kaye Joachim, Counsel for the Commission
Laura Trachuk, Counsel for the Complainant
Robin Cumine, Counsel for Steinberg Inc.
Daniel J. Shields, Counsel for the Great Atlantic and Pacific Company of Canada Ltd.
Harold Caley, Counsel for the Union

INTERIM DECISION

This inquiry involves a complaint made by Diane Gale against Miracle Food Mart (a division of Steinberg's Incorporated), and a complaint made by the Ontario Human Rights Commission (the Commission) against the United Food & Commercial Workers International Union, Local 175 and 633. Diane Gale's complaint, dated 4 November 1985 and amended 9 August 1989, alleges discrimination in employment on the basis of sex by the respondent corporation pursuant to sections 4(1), 8 and 10 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53. The Commission's complaint, dated 4 December 1987, alleges discrimination in employment on the basis of sex by the respondent union, pursuant to sections 4(1) and 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53. I was appointed to serve as the Chair of a Board of Inquiry by the Minister of Citizenship on 12 November 1991. A hearing was scheduled for 30 March 1992, to consider some preliminary legal matters. This decision is an interim ruling on a motion concerning the parties to the proceeding.

Parties to the Proceeding

Counsel for the Commission put forward a motion to amend the complaint to include the following as respondents: Miracle Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P). Although counsel for Steinberg's

Incorporated made no submissions as to the merits of this motion, counsel for the Great Atlantic & Pacific Company of Canada Limited (A&P) and counsel for the union objected.

THE FACTS

Diane Gale first obtained employment with Miracle Food Mart, a division of Steinberg's Incorporated, in September 1972, as a part-time deli/meat clerk at its Ancaster location. In 1974 she was reclassified as a full-time meat wrapper, and apparently was ultimately promoted to the position of Deli Head Clerk. In 1985, Ms. Gale made a complaint of discrimination on the basis of sex, alleging that:

i) as a female deli manager, she was paid less for performing duties of the same value as the male grocery, produce and meat managers;

ii) as a woman, she was denied opportunities for advancement provided to male employees;

iii) her employer engaged in discriminatory hiring and training practices which stream women into lower paying service jobs while men are streamed into higher paying production jobs; and,

iv) her employer engaged in discriminatory wage practices by negotiating and agreeing upon pay rates that have been and continue to be lower for deli managers (who are mostly female), than for other managers (who are mostly male).

In the spring of 1989, the Ancaster Miracle Mart closed down. Diane Gale had sufficient seniority that she was offered a position at another location, but she resigned on 29 April 1989.

On 22 October 1990, there was a sale of selected assets of Miracle Food Mart, a division of Steinberg's Incorporated, to the Great Atlantic & Pacific Company of Canada Limited (A&P). Although the maintenance, warehouse and transportation functions of the Steinberg business were not transferred, the assets required to run the retail supermarket and pharmacy business (outside of the Ottawa area) were. There was no disagreement that the part of the business transferred included the business in which Diane Gale had been employed.

The terms of the asset purchase required Great Atlantic & Pacific Company of Canada Limited (A&P) to offer employment to "all Employees [of Miracle Food Mart, a division of Steinberg's, Incorporated] employed on the closing date" of the asset transfer. The Asset Purchase Agreement made reference to a list of employees to be provided by the vendor to the purchaser. Some 8,000 employees were transferred in this manner.

A collective agreement which had been negotiated by Miracle Food Mart, a division of Steinberg's, Incorporated and the respondent union was still in force, and pursuant to s.64 of the Ontario Labour Relations Act the terms and conditions continued

in force vis-a-vis the new employer.

At the time of sale, the parties made certain representations and warranties, with the vendor stipulating that other than as disclosed, there were no pending claims against the business. Section 3.1 (10) of the Asset Purchase Agreement stated that except as described in Schedule 3.1(10), there was "no action, claim or demand or other proceeding pending or (to the Vendors' knowledge) threatened before any court or administrative agency against or affecting the Business or any Store...." This schedule contained a 14 September 1989 letter from Chris Riggs, counsel for Steinberg's, Incorporated, which mentioned the complaint of Diane Gale in the following terms:

> Miracle Food Mart
>
> Diane Gale Human Rights Complaint - This ongoing case relates to a complaint under the Ontario Human Rights Code alleging discrimination on the basis of sex. Settlement discussions have not been successful, the complaint has now been amended and meetings with a job evaluation consultant have taken place at the request of a Human Rights Officer. Outcome of the case and scope of liability is unknown at this time.

Additional clauses in the Asset Purchase Agreement dealt with the matter of liability and indemnity for such claims between the two companies concerned. Section 6.4 stated:

> From and after the Closing Date, the Purchaser shall assume full responsibility for all Employees (other than those who refuse to accept employment with the Purchaser on the terms set forth herein) for all amounts payable to, or for the benefit of such Employees, including claims based on such Employees' past service or seniority with the Vendors....

> From and after the Closing Date, the Purchaser shall indemnify and save harmless the Vendors for
>
> > a) all claims which may be made against the Vendors by such Employees for statutory termination pay, statutory severance pay, reasonable notice at common law or pay in lieu thereof or payments required to be made pursuant to any collective agreement applicable to such Employees, applicable laws or otherwise.... and,
> >
> > b) any or all losses, damages, expenses, liabilities, claims and demands whatsoever made or brought against the Vendors by any person, association or trade union or by any federal, provincial municipal or other government department, commission, board, bureau, agency or instrumentality or any person or body in respect of such Employees....
>
> The Vendors shall be responsible for, and shall indemnify and save the Purchaser harmless from (i) all claims and grievances listed in Schedule 3.1(12) (updated from time to time prior to the Closing Date) and all other grievances filed after the date hereof and prior to the Closing Date; and, (ii) any and all claims for severance pay, termination pay or allowances or otherwise of (a) any Employees of the Vendors who refuse to accept employment with the purchaser on the terms set forth herein and (b) any other current or former employee of the Vendors or any of their affiliates and the bargaining agents of such employees (other than the Employees). The Purchaser shall have carriage of the foregoing matters referred to in clause (i) above provided that the Purchaser shall act diligently in defending such matters and that the Purchaser shall not settle any matter without the prior written consent of the Vendors, such consent not to be unreasonably withheld.

There was some disagreement expressed between counsel for the Great Atlantic & Pacific Company of Canada Limited (A&P) and counsel for Steinberg's Incorporated over the interpretation of these provisions regarding the division of responsibility for outstanding employee claims.

From 22 October 1990 until 28 February 1992, the Great Atlantic & Pacific Company of Canada Limited (A&P) operated the Miracle Food Mart stores through its wholly-owned subsidiary, Miracle Food Mart of Canada Limited. Counsel for the Great Atlantic & Pacific Company of Canada Limited (A&P) explained this as necessary "for tax reasons". On the latter date, Miracle Food Mart of Canada Limited was amalgamated with the Great Atlantic & Pacific Company of Canada Limited, under the A&P name. A&P continues to carry on retail supermarket business at various locations, under the following names: "A&P", "Miracle Food Mart", and "Dominion". Counsel for the Commission submitted as an exhibit an advertising flyer, effective 30 March 1992, under the name of Miracle Foodmart, and noted that the Bell Telephone listing shows Miracle Food Mart continuing to carry on business.

On 12 November 1991, this board of inquiry was appointed, and hearing commenced by way of a telephone conference call on 27 November 1991. Chris Riggs, of Hicks Morley Hamilton Stewart Storie, acted as counsel for the respondent corporation. His involvement in this case can be described as follows. He was retained by Miracle Food Mart (a division of Steinberg's Incorporated) in 1986 following the initiation of the complaint. He acted for this corporation during the investigation, conciliation and disclosure phases of the case. Subsequent to the agreement of purchase and sale between Steinberg's

Incorporated and the Great Atlantic & Pacific Company of Canada Limited (A&P) in 1990, he also came to act on the latter company's behalf with respect to the matter. Between the date of sale, through the appointment of the board of inquiry in 1991, and during the conference call on 27 November 1991, Chris Riggs continued to act for both corporations.

During the conference call, Chris Riggs advised that there might be an issue as to parties to the complaint which would have to be addressed at the hearing. This was the first point at which counsel for the Commission was notified of the corporate sale. On 20 February 1992, Chris Riggs notified the Commission that he would no longer be acting for either Miracle Food Mart (a division of Steinberg's Incorporated) or Miracle Food Mart of Canada Limited before the board of inquiry. By letter of 23 March 1992, he explained that it had become "apparent to us that it would no longer be appropriate for us to act for both corporations and, having regard to all the circumstances, the proper course of action was for us to cease to act for either corporation before the board of inquiry." At the hearing, Robin Cumine represented Steinberg's Incorporated and Daniel J. Shields represented the Great Atlantic & Pacific Company of Canada, Limited (A&P).

LEGAL ARGUMENT

Counsel for the Commission sought an order adding Miracle

Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P) to this complaint. Section 38 of the Code provides:

> (1) The board of inquiry shall hold a hearing,
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> (a) to determine whether a right of the complainant under this Act has been infringed;
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> (b) to determine who has infringed the right; and
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> (c) to decide upon an appropriate order under section 40....
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> (2) The parties to a proceeding before a board of inquiry are,
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> (a) the Commission, which shall have carriage of the complaint;
>
> (b) the complainant;
>
> (c) any person who the Commission alleges has infringed the right;
>
> (d) any person appearing to the board of inquiry to have infringed the right....
>
> (3) A party may be added by the board of inquiry under clause (2)(d)...at any stage of the proceeding upon such terms as the board considers proper.

The Commission argued that it had not been notified of the change in business ownership, and that neither complainants nor human rights officers were "skilled pleaders": [Styres v. Paiken (1982), 3 C.H.R.R. D/926 at D/927]. The Code provides a wide-ranging discretionary power for boards of inquiry to add parties, and was legislation of broad, purposive, quasi-constitutional status. In determining who was the employer under the Code,

regard must be had to the purpose of the legislation which was remedial and compensatory in nature. The business carried on by Miracle Food Mart of Canada Limited, as amalgamated by the Great Atlantic & Pacific Company of Canada (A&P), was the business which was the subject matter of the Gale complaint. Under the Code, no person shall infringe or do, directly or indirectly, anything that infringes a right under the Code. Failure to add the latter two corporations would frustrate the board of inquiry's power to award an appropriate remedy, particularly since it was as yet unclear whether Diane Gale would be seeking reinstatement. Furthermore, since this case was a claim of systemic discrimination, potentially requiring a remedial order for affirmative action measures to prevent recurrence of violation, [Action Travail des Femmes v. Canadian National Railway Company (1987), 8 C.H.R.R. D/4210.], inclusion of the purchaser corporation was essential.

Counsel for Great Atlantic & Pacific Company of Canada Limited (A&P) argued that it would be improper to add his client to these proceedings. There had been no allegations in these proceedings or complaints that either Miracle Food Mart of Canada LImited, or Great Atlantic & Pacific Company of Canada Limited (A&P) had infringed any right under the Code. None of the enforcement mechanisms of the Code had been exercised with respect to either of them. Following the acquisition there had been "a complete realignment of management positions", changes

which reflected the "differing size, philosophy, goals and objectives" of the new owner. If there were allegations to be made, complaints should be laid directly against the purchaser corporation, and proper resort had to the investigation and conciliation phases of human rights inquiries pursuant to the Code. It was be unfair to add the purchaser corporation as a party at this point, in effect holding that it had "contracted into" liability under the Code through the purchase of the business. Counsel for the union agreed, arguing that this would be similar to forcing a second company to "pay for the sins" of the first.

DECISION

Boards of Inquiry have frequently exercised the power to add respondents to complaints in the past. It appears that in most previous cases, boards have done so where they concluded that the respondent was involved with the incidents surrounding the complaint and no prejudice would result. See, for example, Tabar and Lee v. Scott and West End Construction Limited (1982), 3 C.H.R.R. D/1073; Dudnik v. York Condominium Corp. No. 216 (No. 2) (1990), 12 C.H.R.R. D/325; Rapson v. Stemms Restaurants Ltd. (1991), 14 C.H.R.R. D/449. There appear to be few, if any, precedents where a second respondent was added on the basis of having purchased some of the assets of the initially-named respondent.

Counsel for Great Atlantic & Pacific Company of Canada Limited (A&P) claimed that the order sought here was analogous to a declaration of "successor rights" under the Ontario Labour Relations Act. Section 63 provides that where an employer who is bound by a collective agreement with a trade union sells its business, the purchaser of the business remains, until the Board declares otherwise, "bound by the collective agreement as if the person had been a party thereto." Similarly, counsel argued that section 13 of the Employment Standards Act provided that upon the sale of a business, the purchaser was deemed to be the employer for the purposes of certain defined sections of the Act. Lacking similarly specific successor rights provisions in the Code, he claimed that this board of inquiry lacked jurisdiction to add a purchaser corporation under these circumstances.

The lack of an express "successor rights" provision in the Code is not, in my opinion, determinative. The broadly worded provisions in section 38 charge a board of inquiry with the responsibility of examining a complaint to determine who has infringed the Code. The board is also required to decide upon an "appropriate order", which, under the sweeping powers of section 40, permit the board to order a party "to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices." To facilitate this, section 38 makes clear that the "proper parties" are "any person appearing

to the board of inquiry to have infringed the right", (emphasis added).

Counsel for the Great Atlantic & Pacific Company of Canada, Limited (A&P) argued that under corporate law, employees of one corporation who become employees of a second corporation are not employed by the same employer. [M.N.R. v. Blackburn (1976), 66 D.L.R. (3d) 191 (F.C.A.)] The two corporations here had different legal personalities, were owned separately, and indeed at the time of the Asset Purchase Agreement were economic competitors. Contracts of employment are not assignable from one corporate employer to another. Corporate law principles, he argued, prevented the addition of the purchaser corporation as a party to this case.

In my view, this is not a definitive answer either. Infringements of human rights legislation, particularly in a case of systemic discrimination, do not evaporate when a business changes ownership. Here the complaint centres upon alleged practices of hiring, job streaming, and wage discrimination, the results of which were inherited by the purchaser corporation when it made offers of employment to the over 8,000 employees who transferred to the new corporation. This is not a question of "contracting into" the human rights violation, or "paying for the sins of the first company". When one purchases a business, certain patterns and practices of that business are potentially

inherited as well. To the extent that these past practices may have been unlawful, and to the extent that they continue to impact upon the current business operation, the problems will infect the practices of the purchasing corporation. To this extent, the problems become those of the new employer. That the purchaser company inherited the existing collective agreement outlining wage rates and seniority provisions, negotiated by the vendor company in conjunction with the respondent union (which itself is the subject of a complaint before this tribunal), lends strength to this view.

The Great Atlantic & Pacific Company of Canada Limited (A&P) may indeed have different corporate goals, objectives and philosophies from the former employer. Even assuming that the complainants are able to prove all of the allegations made out against the vendor company, it is possible that the purchasing company has managed to root out and cure the features of the alleged systemic discrimination. However, this is a matter which requires further inquiry, an inquiry which is best pursued at the level of a hearing before this board of inquiry.

Perhaps the strongest argument made by counsel for the Great Atlantic & Pacific Company of Canada Limited (A&P) was the fact that Diane Gale was no longer employed by the vendor company at the closing date of the sale. Diane Gale resigned from her job with Miracle Food Mart of Canada (a division of Steinberg's

Incorporated) on 29 April 1989. The purchaser company did not acquire the assets until 22 October 1990. As a result, it was argued, they never contracted to offer Diane Gale employment, something which was offered only to "current" employees of the vendor corporation. Lacking any evidence of a direct employment relationship with Diane Gale, it would be improper to bring the purchaser corporation into this complaint as a party.

While this is a strong argument at first appearance, I believe that it is not compelling upon further examination. The circumstances under which Diane Gale resigned her employment with the vendor company were not outlined in detail during the preliminary argument. The actual circumstances and reasons for the resignation will undoubtedly unfold during the evidentiary portion of the proceedings. However, it is not unusual for complainants in human rights proceedings to resign their employment prior to the conclusion of the inquiry. Some resign, some are laid off, some are dismissed by their employers. None of this prevents a board of inquiry from examining whether the Code has been infringed by the parties complained of, and considering whether damages or reinstatement are appropriate remedial measures. Had this adjudication been completed before the closing date of sale, there is a potential that Diane Gale might have been reinstated to her former position or to some other position in the corporation. The fact that the delay which encumbers human rights proceedings prevented the resolution of

this issue ought not to change the legal status of the complainant. The outstanding human rights complaint has the effect of maintaining Diane Gale's employment status throughout the asset transfer, at least for the purposes of this inquiry. That the contracting corporations understood this to be the case is evident from the disclosure of Gale's claim in the Asset Purchase Agreement.

As for the argument that a more proper response to this motion would be to require an individual complainant or the Commission to launch a new complaint against the purchaser company, which should be investigated and conciliated **ab initio**, I think that the wording of section 38 disposes of this claim with ease. Section 38 specifically authorizes a board of inquiry to add a party "at any stage of the proceeding". The Legislature has explicitly recognized that it may be more expeditious to join parties at the outset of a hearing, or indeed well into a hearing. The cumbersome delays attendant upon the human rights investigation process are a matter of public record. In certain circumstances, it would be unduly burdensome to force litigants back to the drawing board to begin all over again. This is particularly so in cases such as this, where a purchaser corporation had notice of the vendor corporation's outstanding claim, apparently attempted to contract about the potential liability in the Asset Purchase Agreement, and shared counsel on this matter for more than a year.

In conclusion then, after hearing the arguments of counsel, examining the complaints, and reviewing the Asset Purchase Agreement, I am of the opinion that Diane Gale's allegations of infringement of employment rights under the Code require me to add Miracle Food Mart of Canada, Limited, Great Atlantic & Pacific Company of Canada Limited (A&P) as a respondent party at the outset of this hearing. At this stage it is unclear whether the potential liability for these allegations reaches only the vendor company and the union, or extends to the purchaser company. Only a full inquiry with all of the participants present, will permit a proper resolution of these matters.

ORDER

I am prepared to grant the motion. It appears to me that Miracle Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P) may have infringed a right of the complainant's under the Code. I will exercise my discretion under section 38(3) to add it as a party at this stage of the proceeding. The complaint of Diane Gale against Miracle Food Mart (a division of Steinberg's, Incorporated) will be amended to include as respondents the Miracle Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P).

Given that the same counsel, Chris Riggs, acted for both vendor and purchaser corporation on this complaint until 20

February 1992, there would appear to be no prejudice to Miracle Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P), despite their addition as a party at this stage in the proceeding. To the extent that the latter corporation may have suffered prejudice, however, I am willing to entertain arguments, at the next date set for the continuation of the hearing, as to the need for an adjournment.

C Backhouse

Constance Backhouse
Chair, Board of Inquiry